88-485

No. _____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

TEAMSTERS PENSION TRUST FUND OF PHILADELPHIA AND VICINITY, TEAMSTERS HEALTH AND WELFARE FUND OF PHILADELPHIA AND VICINITY and CHARLES J. SCHAFFER, JR.

Petitioners,

v.

ROGER E. WOOLEYHAN, RALPH K. FILLINGAME, WILLIAM A. PHILLIPS and ROGER B. WOOLEYHAN

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF DELAWARE

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the specific multiemployer plan rules and purpose of 29 U.S.C. §§ 1145, 1132 (g) (2), enacted in 1980, save the Delaware Wage Payment and Collection Act, as it concerns collection remedies of a multiemployer benefit plan, from the general pre-emption rule of 29 U.S.C. § 1144 (a), enacted in 1974.

2. Whether 29 U.S.C. § 1144 (a) pre-empts all state law in relating to arm's length commercial transactions involving an employee benefit plan.

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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

TEAMSTERS PENSION TRUST FUND OF PHILADELPHIA AND VICINITY, TEAMSTERS HEALTH AND WELFARE FUND OF PHILADELPHIA AND VICINITY and CHARLES J. SCHAFFER, JR.

Petitioners,

v.

ROGER E. WOOLEYHAN, RALPH K. FILLINGAME, WILLIAM A. PHILLIPS and ROGER B. WOOLEYHAN

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF DELAWARE

Petitioners Teamsters Pension Trust Fund of Philadelphia and Vicinity, Teamsters Health and Welfare Fund of Philadelphia and Vicinity and Charles J. Schaffer, Jr. ask that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Delaware entered in this case on June 23, 1988.

OPINIONS BELOW

The order of the Supreme Court of the State of Delaware is unreported and is reproduced as Appendix A of this petition. The letter opinion of the Superior Court of Delaware for New Castle County is unreported and is reproduced as Appendix B of this petition.

JURISDICTION

The order of the Supreme Court of the State of Delaware was entered on June 23, 1988. The Court has jurisdiction by writ of certiorari under 28 U.S.C. § 1257 (3) as the validity of a state statute is drawn in question on the ground of its being repugnant to the laws of the United States and Article VI, § 2 of the Constitution.

STATUTES INVOLVED

The statutory provisions of direct relevance are §§ 515, 502 (g) (2), 3 (5) and 514 of the Employee Retirement Income Security Act, as amended by the Multiemployer Pension Plan Amendments Act, ("ERISA"), 29 U.S.C. §§ 1145, 1132 (g) (2), 1002 (5), 1144 (1982), and 19 Del. Code Ann. tit. 19 §§ 1101 (b), 1109 (1985).

29 U.S.C. § 1002. Definitions.

* * *

(5) The term "employer" means any person acting directly as an employer, in relation to an employee benefit plan; and includes a group or association of employers acting for an employer in such capacity.

29 U.S.C. § 1132. Civil enforcement.

* * *

(g) Attorney's fees and costs; awards in actions involving delinquent contributions.

* * *

(2) In any action under this subchapter by a fiduciary for or on behalf of a plan to enforce section 1145 or this title in which a judgment in favor of the plan is awarded, the court shall award the plan -

(A) the unpaid contributions,

(B) interest on the unpaid contributions,

(C) an amount equal to the greater of -

(i) interest on the unpaid contributions, or

(ii) liquidated damages provided for under the plan in an amount not in excess of 20 percent (or such higher percentage as may be permitted under Federal or State law) of the amount determined by the court under subparagraph (A),

(D) reasonable attorney's fees and costs of the action, to be paid by the defendant, and

(E) such other legal or equitable relief as the court deems appropriate.

For purposes of this paragraph, interest on unpaid contributions shall be determined by using the rate provided under the plan, or, if none, the rate prescribed under section 6621 of Title 26.

29 U.S.C. § 1144. Other laws.

(a) Supersedure; effective date.

Except as provided in Subsection (b) of this section, the provisions of this subchapter and Subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in Section 1002 (a) of this title and not exempt under Section 1003 (b) of this title.

29 U.S.C. § 1145. Delinquent contributions.

Every employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement.

19 Del. C § 1101. Definition of terms.

(b) For the purpose of this chapter the officers of a corporation and any agents having the management thereof who knowingly permit the corporation to violate this chapter shall be deemed to be the employers of the employees of the corporation.

19 Del. C. § 1109. Benefits and wage supplements.

(a) Any employer who is party to an agreement to pay or provide benefits or wage supplements to any employee shall pay the amount or amounts necessary to provide such benefits or furnish such supplements within 30 days after such payments are required to be made; provided, however, that this section shall not apply to employers subject to Part I of the Interstate Commerce Act.

(b) As used herein, "benefits or wage supplements" means compensation for employment other than wages, including, but not limited to, reimbursement for expenses, health, welfare or retirement benefits, and vacation, separation or holiday pay, but not including disputed amounts of such compensation subject to handling under dispute procedures established by collective bargaining agreements.

STATEMENT OF THE CASE

Petitioners are the Teamsters Pension Trust Fund of Philadelphia and Vicinity, the Teamsters Health and Welfare Fund of Philadelphia and Vicinity and Charles J. Schaffer, Jr., the administrator of the Funds and a named fiduciary. The Funds provide health and retirement benefits to approximately 100,000 eligible participants and beneficiaries. They are employee welfare and pension benefit plans within the meaning of ERISA, 29 U.S.C. §§ 1002 (1), 1002 (2). The Funds are collectively bargained multiemployer plans within the meaning of 29 U.S.C. § 1002 (37) and deal at arm's length with over 1,000 independent employers from a variety of states, including New York. Mr. Schaffer is the fiduciary charged with collecting contributions due the Funds under the standards in 29 U.S.C. §§ 1104, 1106.

Respondents Roger E. Wooleyhan, Ralph K. Fillingame, William A. Phillips and Roger B. Wooleyhan are the owners and officers of Wooleyhan Transport Company ("Wooleyhan" or "Company"), a Delaware corporation. Wooleyhan's truck drivers and other employees were represented for purposes of collective bargaining by various local unions affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America ("Union"). Wooleyhan was party to collective bargaining agreements which obligated it to make contributions to the Funds based upon hours worked by or paid to its employees domiciled in terminals located in Delaware and Pennsylvania.

During the period October, 1983 to April, 1985, Wooleyhan failed to pay contributions to the Funds. A settlement then painstakingly negotiated over many months with labor relations personnel of Wooleyhan was rejected by Respondents. The Welfare Fund is owed at least $12,971.01 and at least $34,424.54 is owed to the Pension Fund based upon remittance reports prepared by

Wooleyhan and submitted to the Funds for Delaware employees.[1] Additional monies are due for work by other employees. Wooleyhan has not paid to date and full collection from the corporate bankruptcy is not possible.

Respondents knowingly had Wooleyhan withhold the pension contribution payments in order to finance operations and preserve their stock interest. The Funds were originally advised that contributions were not being paid because of financial difficulties and a decision by the management of the Company, in particular the Respondents, not to pay the contributions owed to the Funds in order to use the money for other purposes. The Company continued to make contribution payments to the Welfare Fund until shortly before a corporate bankruptcy (to insure continued medical coverage of employees) and to submit reports. It simply and consistently omitted pension payments - which have only long-term effects on employees. The practice confirmed other reports that Respondent Roger E. Wooleyhan had specifically decided not to pay the pension contributions.

Petitioners filed a Complaint in the Superior Court of Delaware to protect their interests upon the bankruptcy of Wooleyhan. Respondents timely moved to dismiss the Complaint on the basis that the Wage Payment and Collection Act of Delaware ("WPCA"), 19 Del. C. Chapter 11, was pre-empted by ERISA.

The Superior Court granted Respondents' motion to dismiss concluding that the WPCA was pre-empted by ERISA, 29 U.S.C. § 1144 (a), because it "related to" an employee benefit plan. A-3, 4. The court relied on the decisions of this Court in *Shaw v. Delta Air Lines,* 463 U.S. 85 (1983); *Pilot Life Ins. Co. v. Dedeaux,* 107 S.Ct. 1549 (1987) and *Metropolitan Life Ins. Co. v. Taylor,* 107 S. Ct. 1542 (1987). A-3. Petitioners timely appealed.

By order dated June 23, 1988, the Supreme Court of the State of Delaware summarily affirmed the decision of the Superior Court "on the basis of and for the reasons assigned by the opinion of the Superior Court dated December 11, 1987." A-1. The Delaware Supreme Court, however, cited *McMahon v. McDowell,* 794 F.2d 100 (3d Cir.) *cert. denied,* 107 S.Ct. 473 (1986) as its principal reference. A-1. Petitioners seek a writ of certiorari to review the order of the Supreme Court of the State of Delaware.

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1. The delinquency has no impact on pension benefits to employees as the plan must credit them with service for all time for which contributions were required, whether or not paid. See, 29 C.F.R. § 2530.200b-2 (a) (1), (2); Rev. Rul. 85-130, 1985-2 C.B. 137.

REASONS FOR GRANTING THE WRIT

I. THERE IS AN APPELLATE CONFLICT ON PRE-EMPTION OF STATE LAWS CONCERNING MULTI-EMPLOYER BENEFIT PLAN COLLECTIONS

The Supreme Court of Delaware based its decision on *McMahon v. McDowell. McMahon* is inapposite as it involved a single employer plan not subject to the multiemployer plan remedies in 29 U.S.C. §§ 1145, 1132 (g) (2). This case involves a multi-employer plan under state law expressly saved from pre-emption by the special multiemployer plan amendments in 1980 and their legislative history.[2] As Justice White has noted on a similar question, *McMahon v. McDowell,* 107 S.Ct. 473 (1986) (White, J., dissenting), the Delaware court ". . . holding conflicts with the decision in *Sasso v. Vachris,* 66 N.Y.2d 28, 484 N.E.2d 1359 (1985)." Unlike *McMahon,* the law and facts are entirely parallel to *Sasso v. Vachris.*

In 1980, Congress enacted Section 515 of ERISA, 29 U.S.C. § 1145, to give multiemployer plans a specific federal statutory cause of action to collect contributions to supplement their third-party beneficiary claims under labor agreements. At the same time, Congress amended ERISA Section 502 (g), 29 U.S.C. § 1132 (g), to expand the relief provided to multiemployer plans if they prevail in an action to collect delinquent contributions. The changes explicitly sanction damage claims ". . . permitted under . . . State law," 29 U.S.C. § 1132 (g) (2) (C) (ii), and thus adopt and incorporate (the allegedly pre-empted) state law into the governing statute in specific terms.

Sasso v. Vachris explains the analytic error of the Delaware courts in ignoring the 1980 changes and their legislative history:

> Business Corporation Law § 630 imposes personal liability upon the ten largest shareholders of closely held New York corporations for the payment of wages and salaries due and owing to its employees. The statute

---

2. A multiemployer plan is, by definition, a product of arm's-length collective bargaining, 29 U.S.C. § 1002 (37). Under 29 U.S.C. § 186 (c) (5), the Fund and its assets must remain separate from both the union and the employer. C.f., *N.L.R.B. v. Amax Coal,* 453 U.S. 322 (1981) (Employer may not insist on multiemployer plan representation in collective bargaining). As succinctly described in *Connolly v. PBGC,* 673 F.2d 1110, 1112 (9th Cir. 1982), the Fund operates as an intermediary receiving fixed contributions from employers and paying benefits to employees from available assets.

expressly defines wages and salaries to include employer contributions for welfare benefits and to pension funds . . . . It is designed to remedy precisely the default which is alleged in this litigation. . . .

Section 630 "relates to" the scope of shareholder immunity [under state law] . . . . like the Pennsylvania Wage Payment and Collection Law considered in *Carpenters Health and Welfare Fund of Philadelphia v. Kenneth R. Ambrose, Inc.* (727 F.2d 279) . . ., the only effect of section 630 on employee benefit plans is to give plaintiffs a cause of action to recover payments the corporation was already obligated to provide.

* * *

Nor do the 1980 amendments to ERISA indicate an intent on the part of the Congress to preempt existing state remedies such as Section 630. They merely added a statutory obligation upon employers to make contributions to multiemployer plans as required by the terms of the employee benefit plan or the collective bargaining agreement . . . . Contrary to the position taken by the Defendants, the relevant legislative history of these amendments evinces a specific congressional intent that *ERISA's civil remedies merely supplement, rather than supersede, existing state remedies* . . ., at least insofar as they provide for the collection of delinquent employer contributions to [multiemployer] employee benefit plans . . .*

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* The Senate Labor and Finance Committee's Joint Explanation of S. 1076 which contained the provisions that later became 28 U.S.C. §§ 1145 and 1132 (g) (2), contained the following statement:

Under the bill, in the case of a civil action by any person to collect delinquent *multiemployer* plan contributions, *regardless of otherwise applicable law,* in which a judgment in favor of the plan is awarded, the court before which the action is brought must award the plan (1) the unpaid contributions; (2) interest on the unpaid contributions; (3) an amount equal to the greater of interest on unpaid contributions or liquidated damages under the plan not to exceed 20% of the

> amount of delinquent contributions as determined by the court. The bill preempts any state or other law which would *prevent* the award of reasonable attorney's fees, court costs or liquidated damages or which would *limit* liquidated damages to an amount below the 20% level.
>
> However, the bill does not preclude the award of liquidated damages in excess of the 20% level where an award of such higher level of liquidated damages is permitted under applicable state or other law. *This [law] does not change any other type of remedy permitted under state or federal law with respect to delinquent multiemployer plan contributions"* (126 Cong. Rec. at p. 20202).
>
> The Report of the House Ways and Means Committee to accompany H.R. 3904, the companion house bill, contained a virtually identical statement (See, H.R. Rep. No. 889, 96th Cong., 2d Sess., Part II 48-49, *reprinted in* 1980 U.S. Code. Cong. & Ad. News 2918, 3037-3038). Also *it is clear that* both Houses of *Congress viewed the* enforcement *amendments of 1980 as setting* forth *a floor of federal remedy in the case of delinquent [multiemployer plan] contributions* below which the states could not go *but which did not preempt or supersede state remedies that granted greater protection than* that contained in *ERISA*.

Id., 484 N.E.2d, at 1360-1364 (emphasis added). The Third Circuit reached the same obvious conclusion in a prior case involving a multiemployer plan, *Carpenter's Health and Welfare Fund of Philadelphia and Vicinity v. Kenneth R. Ambrose, Inc.*, 727 F.2d 279, 282 n. 5 (3d Cir. 1983). There is no apparant consideration of the 1980 amendments and their legislative history by the Delaware courts or other cases on this subject.

The separate treatment of multiemployer plan funding as a commercial transaction permeates the statute and its policy. In promulgating ERISA Prohibited Transaction Class Exemption 76-1, 1976-1 C.B. 357, shortly after the enactment of ERISA in 1974, the Department of Labor and Internal Revenue Service concluded that ". . . participating employers have little, if any, control over the contribution collection efforts made by [multiemployer] plans," 1976-1 C.B. at 359. The exemption thus treats

the relation between the employer and a multiemployer plan as an arm's-length commercial transaction. It provides that the failure to collect a delinquency from an employer by a multiemployer plan is not a prohibited transaction (subjecting the employer and plan fiduciaries to liability under 29 U.S.C. § 1106) as long as the plan makes commercially reasonable attempts at collection. The agencies expressly refused to treat funding of single employer plans collectively bargained, as an arm's length relationship, noting the absence of safeguards in the form of independent administration of the collection process, 1976-1 C.B. at 360.

The Delaware court legislated a repeal of the Delaware WPCA in favor of application of traditional shareholder and officer immunity under prior *state* corporate law. Pre-emption, however, means a complete nationwide substitution of *federal* policy as federal common law under ERISA, *Massachusetts Mutual Life Ins. Co. v. Russell,* 473 U.S. 134, 156-157 (1985) (Brennan, White, Marshall, Blackmun, JJ., concurring). Federal common law is developed from expressions of *federal* policy, *DelCostello v. Teamsters,* 462 U.S. 151, 171-172 (1983). Here, that federal policy guidance suggests corporate officer and shareholder liability — under precisely the same standard of willfulness as the Delaware WPCA — by reason of the similarity of language in the "employer" definitions in ERISA and the federal minimum wage law. *C.f., Massachusetts Laborers H. & W. Fund v. Starrett Paving Corp.,* 845 F.2d 23, 24-25 (1st Cir. 1988) (officer can be ERISA "employer" in view of similarity to Fair Labor Standards Act). 29 U.S.C. § 1106 (a) condemns the delinquency as a prohibited and "void" loan from the plan to "parties-in-interest," including the contributing business, its officers and ten percent (10%) owners, 29 U.S.C. § 1002 (14) (C), (H). *See also* Rev. Rul. 80-140, 1980-1 C.B. 89 (single employer plan delinquency is prohibited transaction under parallel tax section).[3] 29 U.S.C. § 1132 authorizes both legal and equitable relief for any violation of ERISA's prohibited transaction rules. The general rules of ERISA thus do not follow traditional corporate law apparently applied by the Delaware courts.

The delinquency in this case was willfully incurred to obtain unsecured credit to finance operations without an infusion of

3. In a single-employer pension plan the employer is directly subject to minimum funding excise taxes under 26 U.S.C. §§ 412, 4971. By contrast, multiemployer plan contributions are regulated only for the "plan" as an aggregate of all employers, 29 U.S.C. §§ 1082, 1060 (a) (3); 26 U.S.C. §§ 412, 413 (b) (5). Amounts not collected from one employer may be balanced by higher payments from another company.

capital and would justify a constructive trust to remedy the resultant benefit occasioned to corporate owners and officers. The 1980 ERISA amendments allow the law of labor contracts and state law to operate with respect to multiemployer plans in this context to complement the treatment of multiemployer plan funding as an arm's-length transaction under Class Exemption 76-1.

II. THE GENERAL QUESTION OF PRE-EMPTION OF STATE LAW AFFECTING COMMERCIAL TRANSACTIONS INVOLVING EMPLOYEE BENEFIT PLANS IS IMPORTANT

The language of 29 U.S.C. § 1144 (a) contains an object as well as a subject and verb. It pre-empts state laws only ". . . insofar as they . . . relate *to any* employee benefit *plan* [as defined in ERISA] . . ." (emphasis supplied). The verb "relates" to the object — an "employee benefit plan." The term "employee benefit plan" is a term of art under 29 U.S.C. §§ 1002 (1), (2), (3) and 1132 (d) (2) referring to a "plan, program or practice" for benefits which is deemed to be a separate federally-organized entity. Pre-emption extends only to laws affecting the federal entity and its operations as such. The Delaware court mistakenly expanded the sentence to cover any state law relating to a transaction involving a plan with devastating implications for state regulation in the national economy.

The only tie between the Delaware WPCA and the Funds is a potential effect on the plan's income. The contract is negotiated by the union and employer at arm's-length without the Funds. Each employer pays a fixed sum. Benefits are provided out of the pool of assets created by all contributions without regard to the particular experience of the employees of a single company. *C.f.*, 29 C.F.R. § 2615.2 "Plan"; 26 C.F.R. § 1.414 (l)-1 (b) (1) (Plan is defined by availability of assets for all participants; 26 U.S.C. § 414 (l) parallels 29 U.S.C. § 1058). The action does not involve a claim for payment of benefits, n. 1, *supra.*

The apparent theory of the Delaware courts is that "ERISA may not confront the . . . issue at this time, but [29 U.S.C.] Section [1144 (a)] has cleared the decks for such provisions, should Congress choose to address this concern in the future," *Plumbers Local 598 J. & A. T. F. v. J. A. Jones Constr. Co.*, 846 F.2d 1213, 1220 (9th Cir. 1988), quoting *Stone & Webster Eng'g Corp. v. Ilsley*, 518 F.Supp. 1297, 1301 (D. Conn. 1981) *aff'd*, 690 F.2d 323 (2d Cir. 1982) *aff'd mem.*, 463 U.S. 1220 (1983). The proposition proves entirely too much in application to any trans-

action involving an employee benefit plan. It creates a federalized vacuum of commercial law which Congress never adopted under its power to regulate interstate commerce.

A few examples of the implications of the Delaware decisions should suffice.

State Corporate and Securities Laws. The cases to date reject pre-emption of state corporate law relating to transactions involving a corporation, its directors and a benefit plan shareholder, *Sommers Drug S. Co. E. P. S. Trust v. Corrigan Enterprises, Inc.*, 793 F.2d 1456, 1465-1470 *reh'g denied*, 797 F.2d 977 (5th Cir. 1986) *cert. denied*, 107 S.Ct. 884 and 107 S.Ct. 1298 (1987). Employee benefit plans regulated by ERISA directly own an enormous amount of publicly-traded stock — as much as 25% of all private capital. These investments and employer contributions are the major sources of plan income. State corporate laws regulating dividends, takeovers, limited shareholder and officer liability and similar matters have a direct and substantial "relation" to the value of a plan investment and income received. They would be pre-empted under the decision below because of this "relation" to a plan to "clear the decks" for Congress to act in the future.

Personal Injury. The courts already are in confusion over the right of a state to award damages for loss of fringe benefits in a personal injury action. *Compare Stone & Webster Eng'g* (order to continue payment of welfare benefit contributions [insurance premiums] in worker compensation case pre-empted) *and Plumbers Local 598 J. & A. T. Fund* (state may not regulate its government contracts to require fringe benefit payments for employees of contractor) *with Martori Bros. Distributors v. James-Massengale*, 781 F.2d 1349, 1359 *amended*, 791 F.2d 799 (9th Cir.) *cert. denied*, 107 S. Ct. 435 (1986) (no pre-emption of damages award covering loss of fringe benefits) *and Greenblatt v. Budd Co.*, 666 F.Supp. 735, 742 (E.D. Pa. 1987) (misrepresentation claim not pre-empted merely because deception involved pension benefits).

Fringe benefits represent a large portion of payroll expenses throughout the country. Damages for loss of benefits can increase or decrease tort judgments by millions or even billions of dollars. Under *Plumbers Local 598 J. & A. T. Fund*, the sovereign states cannot even require payment of health benefit premiums under government contracts to protect themselves from claims for medical expenses for employees injured on government work sites.

State Law Liens. Employee benefit plans own billions of dollars of investments in real estate, mortgages and similar loans.

Multiemployer plans also collect millions of dollars a year in contributions through judgments. The value and collectibility of these investments and receivables hinges on state laws governing consensual and judgment liens on real estate or security provided under the various state versions of the Uniform Commercial Code. ERISA itself requires that certain loans by a benefit plan be ". . . adequately secured," 29 U.S.C. § 1108 (b) (1). In *Carpenters Health & W. T. Fund v. Parnas*, 176 Cal.App.3d 1196, 222 Cap.Rptr. 668 (Calif. Ct. App. 1986), the court rejected a pre-emption attack on a mechanic's lien law. *See also Planned Consumer Marketing, Inc. v. Coats & Clark, Inc.*, 71 N.Y.2d 442, 522 N.E.2d. 30 (1988) (New York creditor's rights laws not defeated by transfer of assets to benefit plan). The Delaware court and, recently, the California Court of Appeals, *Carpenters So. Calif. Adm. Corp. V. El Capitan Development Co.*, 197 Cal.App.3d 790, 243 Cal.Rptr. 132 (Calif., Ct. App. 1988) (mechanic's lien pre-empted), conversely would pre-empt all state creditor remedies in cases involving benefit plans.

Congress drew a more limited line pre-empting only matters relating to the "plan" as a federal entity and its administration. Laws which neither require nor affect an ongoing "plan, program or practice" are not pre-empted even though they concern benefits of a type mentioned in ERISA, *Fort Halifax Packing Co. v. Coyne*, 107 S.Ct. 2211 (1987). In the area of suits against independent contractors, the courts have examined whether the suit is, in practical effect, against the federal plan entity. *Compare Metropolitan Life Ins. Co. v. Taylor*, 107 S.Ct. 1542 (1987) (state claims for improper benefit processing against outside contract administrator can be removed as ERISA claim; General Motors plan had insurance risk and appeared for employer, plan and Metropolitan) *and Bruenn v. Aetna Life Ins. Co.*, 197 Cal.App.3d 1000, 243 Cal.Rptr. 262 (Calif. Ct. App. 1987) (same; noting lack of shift in insurance risk from plan to insurer) *with Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724 (1985) (regulation of insurance policies to mandate benefits not pre-empted) *and Isaacs v. Group Health, Inc.*, 668 F.Supp. 306, 312 (S.D.N.Y. 1987) (state claims for breach of contract between plan and service provider and negligence not pre-empted) *and West Michigan Health Care Network v. Transamerica Ins. Corp.*, 167 Mich. App. 218, 421 N.W.2d 638 (Mich. Ct. App. 1988) (no pre-emption of state law imposing primary liability on HMO providing employee plan benefits). A different approach would force virtually every dispute over provision of group insurance or services by

or on behalf of an employee benefit plan into federal court due to its exclusive jurisdiction of most ERISA claims. 29 U.S.C. § 1132.

The law governing transactions between non-plan parties is not displaced, even on funding matters, simply because the transaction involves a plan, *Murphy v. Heppenstall*, 635 F.2d 233 (3d Cir. 1980) *cert. denied*, 454 U.S. 1142 (1982) (agreement between an employer and union to pay more than ERISA minimums for benefits not precluded by ERISA funding rules). The line between "internal" administration of the Plan and "external" commercial dealings involving the Plan is not always easy to draw. The line may be especially unclear in funding matters and perhaps necessitated the express savings clause which Congress enacted in 1980 for multiemployer plan collections.

This case and its underlying Congressional policy present a unique opportunity for the Court to define the parameters of pre-emption in commercial dealings with benefit plans. A decision will help plans and their service providers identify applicable law and predict the consequences of their actions in billions of dollars of transactions involving benefit plans throughout the country.

CONCLUSION

Petitioners ask that a writ of certiorari issue to review the Order of the Supreme Court of the State of Delaware in this case.

Respectfully submitted,

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September 19, 1988

APPENDIX "A"

IN THE SUPREME COURT OF THE STATE OF DELAWARE

TEAMSTERS PENSION TRUST FUND OF PHILADELPHIA AND VICINITY, and TEAMSTERS HEALTH AND WELFARE FUND OF PHILADELPHIA AND VICINITY and CHARLES J. SCHAFFER, JR.,	:	No. 2, 1988
Plaintiffs Below, Appellants,	:	Court Below—Superior Court of the State of Delaware, in and for New Castle County, C.A. No. 85C-JL-11
v.	:	
ROGER E. WOOLEYHAN, RALPH K. FILLINGAME, WILLIAM A. PHILLIPS and ROGER B. WOOLEYHAN,	:	
Defendants Below, Appellees.	:	

Submitted: May 10, 1988
Decided: June 23, 1988

Before MOORE, WALSH and HOLLAND, Justices.

ORDER

This 23rd day of June 1988, the Court having considered the record and briefs of the parties, and it appearing that this matter should be affirmed on the basis of and for the reasons assigned by the opinion of the Superior Court dated December 11, 1987, *Cf. McMahon v. McDowell,* 794 F2d 100 (3d Cir.), *cert. denied,* 107 S.Ct. 473 (1986).

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court be, and the same hereby is,

AFFIRMED.

BY THE COURT:

/s/ Randy J. Holland

Justice

APPENDIX "B"

SUPERIOR COURT
OF THE
STATE OF DELAWARE

Submitted: July 23, 1987
Decided: December 11, 1987

VINCENT A. BIFFERATO
JUDGE

Re: Teamsters Pension Trust Fund of Philadelphia and Vicinity, et al. v. Roger E. Wooleyhan, et al. C.A. No. 85C-JL-11

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Gentlemen:

This action was brought by the Teamsters Pension Trust Fund of Philadelphia and Vicinity (the "Pension Fund") and the Teamsters Health and Welfare Fund of the Philadelphia and Vicinity (the "Welfare Fund")[1] against Wooleyhan and certain officers and agents of Wooleyhan (the "Individual Defendents").

The plaintiffs claim that the Funds are "multi-employer plans" and "employee benefit plans" within the meaning of 29 U.S.C. § 1002 (5), (11) and (12) of the Employee Retirement Income Security Act of 1974 as amended by the Multi-Employer Pension Plan Amendment Act of 1980 ("ERISA").

The plaintiffs allege that Wooleyhan was a party to collective bargaining agreements with locals of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Under the agreement, Wooleyhan promised to make certain payments to the Funds. The plaintiffs claim that Wooleyhan failed to pay contributions to the Funds and that, by virtue of 19 *Del.C.* c. 11, the Individual Defendants are liable for such payments and other damages.

---

1. The Welfare Fund and the Pension Fund will be referred to collectively as the "Funds."

The defendants have moved to dismiss the complaint on the basis that 19 *Del.C.* c. 11 is preempted by ERISA. They claim that ERISA preempts all actions based on state law relating to employee benefit plans and provides no action for individual liability for delinquent corporate contributions to employee benefit plans. The plaintiffs contend, on the other hand, that ERISA permits multi-employer plans to pursue collection remedies under state law in addition to the remedies under ERISA.

ERISA contains an explicit and broad preemption provision. Section 1144 of Title 29 of the United States Code provides:

> "[ERISA] shall supercede any and all state laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003 (a) and not exempt in section 1003 (b) of this title."

The federal courts have held that the words "relate to" should be construed expansively. A law relates to an employee benefit plan, in the normal sense of the phrase, if it has connection with or reference to such a plan." *Shaw v. Delta Airlines*, 463 U.S. 85, 96-97 (1983). Thus, if the claims filed under the Wage Payment and Collection Act "relate" to an employee benefit plan, they fall under ERISA'S preemption clause.

The Court finds persuasive the two recent United States Supreme Court Opinions, *Pilot Life Insurance Co. v. Dedeaux*, 107 S.Ct. 1549 (1987), and *Metropolitan Life Insurance Company v. Taylor*, 107 S.Ct. 1542 (1987), cited by the defendant for the proposition that ERISA preempts all state laws pertaining to employee benefit plans. In *Pilot Life*, the Court held that ERISA, by virtue of 29 U.S.C. § 1144, preempted state common law tort and contract actions. 107 S.Ct. at 1553.

In *Metropolitan Life*, the companion case to *Pilot Life*, the Court held that ERISA displaced state law causes of action relating to employee benefit plans. 107 S.Ct. at 1546. Justice O'Conner, writing for the Court, stated that "[a] suit by a beneficiary to recover benefits from a covered plan . . . falls directly under [29 U.S.C. § 1132 (a) (1) (B)] . . . which provides an exclusive federal cause of action for resolution of such disputes." *Id.* Because ERISA preempted state law, and because 29 U.S.C. § 1132 (f) specifically granted jurisdiction over ERISA matters to the federal courts, the Court further held that even state actions purporting to allege only state law claims were actually federal in character and, as such, removable to federal courts as a matter of right. *Id.* at 1548.

The Court concludes that insofar as the Wage Payment and

Collection Act authorizes the liability of Wooleyhan or the Individual Defendants for unpaid employee benefit plan obligations, it relates and pertains to the underlying employee benefit plans. Therefore, the plaintiffs' claims filed pursuant to 19 *Del.C.* c. 11 are preempted by ERISA. *Metropolitan Life*, 107 S.Ct. at 4469. Accordingly, the defendants' motion to dismiss is GRANTED. IT IS SO ORDERED.

Very truly yours,

/s/ Vincent A. Bifferato

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CLERK

No. 88-485

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

Teamsters Pension Trust Fund of Philadelphia and Vicinity, Teamsters Health and Welfare Fund of Philadelphia and Vicinity and Charles J. Schaffer, Jr.
Petitioners,

v.

Roger E. Wooleyhan,
Ralph K. Fillingame,
William A. Phillips and
Roger B. Wooleyhan
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF DELAWARE

RESPONDENTS' BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF THE QUESTION PRESENTED

Should this Court grant a petition for certiorari to review a decision in which the Supreme Court of Delaware correctly construed 29 U.S.C. § 1144 in a manner not in conflict with any decision of this Court or the most recent decision of any federal court, holding that the Employee Retirement Income Security Act of 1974, as amended, does not permit the use of remedies under a state wage claim statute to redress a failure to make required contributions to an employee benefit plan.

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COUNTER-STATEMENT OF THE FACTS[1]

Petitioners, Teamsters Pension Trust Fund of Philadelphia and Vicinity and Teamsters Health and Welfare Fund of Philadelphia and Vicinity (respectively "Pension Fund" and "Welfare Fund" and jointly "Funds") are "multi-employer plans" and "employee benefit plans" within the meaning of 29 U.S.C. § 1002(37), Section 3(37) of the Employee Retirement Income Security Act of 1974 as amended by the Multi-Employer Pension Plan Amendments Act of 1980 (collectively "ERISA") (Complaint ¶2). Petitioner Charles J. Schaffer, Jr. is a fiduciary within the meaning of 29 U.S.C. 1002(21), Section 3(21) of ERISA and was authorized to bring claims for benefits on behalf of the Funds (Complaint ¶3).

Respondents Roger E. Wooleyhan, Ralph K. Fillingame, William A. Phillips and Roger B. Wooleyhan were officers or managing agents of Wooleyhan

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[1] The issue presented to the trial court and reviewed by the Supreme Court of the State of Delaware in the instant case was submitted on the Complaint and Respondents' Motion to Dismiss only. It is well established that for purposes of passing on such a motion, the allegations of the Complaint are construed favorably to the pleader. *Scheuer v. Rhodes*, 416 U.S. 232 (1974). However, Petitioners' Statement of the Case is replete with allegations immaterial to the Court's consideration of the questions presented and expands well beyond any reasonable inferences to be drawn from the allegations of the Complaint. Petitioners have embellished the limited record with collateral "facts," which even if of record, still do not present a basis which would entitle them to the relief sought in their Complaint. Respondents have attached Petitioners' Complaint here-to as Appendix A and included this Counter-Statement of the Facts to reflect more accurately the uncontested facts of the case from which reasonable inferences may be drawn.

Transport Company ("Wooleyhan" or "Company") (Complaint ¶5). The Company was a Delaware Corporation and employer within the meaning of 29 U.S.C. § 1002(5), (11) and (12), Section 3(5), (11) and (12) of ERISA (Complaint ¶4) which had filed for relief under Chapter 11 of the Bankruptcy Code, 11 U.S.C. Chapter 11 (Complaint ¶12).

Wooleyhan had been a party to collective bargaining agreements with locals of the International Brotherhood of Teamsters, Chauffers, Warehousemen and Helpers of American ("Labor Contract") (Complaint ¶6) and trust agreements with the Funds ("Trust Agreements") (Complaint ¶7). Under the Labor Contract and/or Trust Agreements the Company had agreed, *inter alia*, to make full and timely payments for benefits to the Funds (Complaint ¶18).

Prior to filing for Bankruptcy protection the Company failed to make payment to the Welfare Fund in the amount of "at least" $12,971.07 and failed to make payment to the Pension Fund in the amount of "at least" $34,424.54 (Complaint ¶11). After the filing of the corporate bankruptcy, Petitioners filed a Complaint in the Superior Court of Delaware against Respondents (Appendix A) claiming that under 19 *Del.C.* §§ 1101-1115, the Delaware Wage Payment and Collection Act ("WPCA"), Respondents as corporate officers or managing agents of Wooleyhan were *individually* liable for payment of benefits due from the Company because they knowingly permitted the Company to withhold such payments (Complaint ¶¶13-17).

Respondents countered by filing a Motion to Dismiss the Complaint for failure to state a cause of

action, in that ERISA, particularly 29 U.S.C. § 1144(a), preempted WPCA.

The Delaware Superior Court granted Respondent's motion to dismiss and the Supreme Court of Delaware affirmed. Petitioners have sought a writ of certiorari to review the Order of the Supreme Court of Delaware. Respondents oppose Petitioners' application.

REASONS WHY THE PETITION SHOULD BE DENIED

I. THERE ARE NO SPECIAL AND IMPORTANT REASONS WHY CERTIORARI SHOULD BE GRANTED BECAUSE THE ISSUE IS SETTLED AND THERE IS NO APPELLATE CONFLICT.

There is no "appellate conflict," as Petitioners describe it (Petition, p. 6), which warrants the Court's attention to this matter, which was correctly decided by the Supreme Court of Delaware, in accordance with principles set forth by this Court. The Delaware Court's decision in this case, that the Delaware wage claim statute does not give a right of action to the fiduciary of an ERISA plan to require contributions to be made by individuals to the plan, follows the law of its Circuit, *McMahon v. McDowell*, 794 F.2d 100, 3d Cir., *cert. denied*, 107 S.Ct. 473 (1986), and no other circuit has ruled to the contrary.

Indeed, the decision of the Supreme Court of Delaware accords with the conclusion of every federal court which has had the occasion to rule on the question it decided, that is, that remedies under state wage claim statutes are not available to redress employers' failure to make required contributions to ERISA. *Bartucca v. Katy Inds., Inc.*, 668 F.Supp. 111 (D.Conn. 1987) (holding remedies under Connecticut wage claim statute unavailable to redress employer

breaches of duty to ERISA plan, due to preemption); *Mylstar Electronics, Inc. v. McNeil*, slip op., No. 86-C-837 (N.D.Ill. E.Div. 1986) (enjoining use of Illinois wage claim to enforce rights under ERISA plan); *Trustees v. Aberdeen Blower and Sheet Metal Workers, Inc.*, 559 F.Supp. 561 (E.D.N.Y. 1983) (holding New York labor law's criminal remedies to be preempted by ERISA with respect to contributions to an ERISA plan). Such conclusions have been affirmed by this Court. *Gilbert v. Burlington Industries, Inc.*, 765 F.2d 320 (2d Cir. 1985), *aff'd*, 477 U.S. 901 (1986) (barring use of New York state wage collection remedies to enforce rights asserted under an ERISA plan).

These decisions represent unanimity among all federal courts on this issue, all of which, like the decision of the Supreme Court of Delaware, properly apply the past decisions of this Court and the explicit intent of Congress in Section 514 of ERISA, 29 U.S.C. § 1144, which provides (with exceptions not here relevant regarding state insurance, banking, securities and general criminal laws) that ERISA's enforcement provisions "shall supersede any and all State laws insofar as they may relate to any employee benefit plan" (with other exceptions inapplicable here).

Because Congress intended the regulation of employee benefit plans to be "exclusively a federal concern," *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 523 (1981), the Supreme Court has broadly interpreted the words "relate to," in Section 1144(a), as encompassing—and preempting—any state law that has any "connection or reference to" employee benefit plans. *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 97 (1983). This Court's rulings were grounded in the legislative record, including Representative Dent's

comments on the House floor that "the crowning achievement of this legislation [is] the reservation to Federal authority sole power to regulate the field of employee benefit plans," 120 Cong.Rec. 29197 (1974), and the contemporaneous comments of Senator Williams, chair of the Senate Labor and Education Committee, that the enforcement provisions of the final version of the bill were "intended to preempt the field for Federal regulations, thus eliminating the threat of conflicting or inconsistent State and local regulation of employee benefit plans. This principle is intended to apply in its broadest sense to all actions of State or local governments." 120 Cong.Rec. 29933.

Thus, ERISA preempts all state laws insofar as they apply to employee benefit plans,[2] even if those state laws amount only to indirect regulations of such plans, *Alessi*, 451 U.S. at 525, and "displace all state laws that fall within its sphere, even including state laws that are consistent with ERISA's substantive provisions." *Metropolitan Life Insurance Co. v. Massachusetts*, 471 U.S. 724, 739 (1985).

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[2] This preemption continued even after the enactment of the Multi-Employer Pension Plan Amendments Act of 1980 ("MPPAA"), P.L. 96-364, as the Conference Report to MPPAA emphasizes: "The House amendment to the Senate amendment to the bill provides no exemption from the preemption provision of Section 514 of the Employee Retirement Income Security Act of 1974 [29 U.S.C. § 1144]. The Senate amendments [do] provide an exemption from Section 514(a) of ERISA. . . The Senate recedes to the House petition." H.Rep.No. 96-869, Part II, p. 42, 1980 U.S. Code, Cong. & Admin. News 3032. Petitioners' suggestion to the contrary, at p. 6 of the Petition, is disingenuous. Actions may be maintained in state courts, *cf.*, 29 U.S.C. §§ 1132(e), 1451(c), but only to assert the claims, and seek the remedies, permitted under ERISA. 29 U.S.C. § 1144(a); *Duffy v. Branner*, 529 A.2d 643 (Vt.Supr. 1987).

This Court has restated these principles recently in the companion cases of *Metropolitan Life Insurance Co. v. Taylor*, 481 U.S. 58 (1987), and *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987) (holding that common law contract and tort remedies cannot be used to enforce an employee's right under an ERISA plan); and the exception that proves the general rule, *Fort Halifax Packing Co., Inc. v. Coyne*, ___ U.S. ___, 107 S.Ct. 2211, 2217 (1987) (holding that a state plant-closing law is not preempted by ERISA, because the law's scope did not relate to any employee benefit *plans*, and emphasizing, "Pre-emption ensures that the administrative practices of a benefit plan will be governed by only a single set of regulations").

In summary, this Court has amply outlined the scope of the preemptive effect of ERISA's enforcement provisions. The Petition has not shown any reason why the Court needs to restate these principles in this case—nor has the Petition shown how the Delaware Supreme Court's decision conflicts with the principles already set forth by this Court, so often and so recently.

The Petition's argument for the granting of certiorari is premised on an asserted "appellate conflict." The Petition cites two cases as evidence of this ostensible conflict. One of them, *Carpenters Health and Welfare Fund of Philadelphia and Vicinity v. Ambrose*, 727 F.2d 279, 282 (3d Cir. 1983), which dismissed in a footnote the contention that ERISA preempted state wage claim remedies as "without merit," has been repudiated by the very court that issued it. The other is an aberrant state court holding, *Sasso v. Vachris*, 484 N.E.2d 1359 (N.Y.Ct.App. 1985), which was issued before this Court's instructive

decisions on ERISA preemption in *Metropolitan Life v. Taylor*, *Dedeaux* and *Fort Halifax*, and which thus instead could only rely on the discredited *Ambrose* decision.

In *McMahon v. McDowell*, *supra*, the Third Circuit reversed its decision in *Ambrose*, the only federal decision cited by Petitioners in support of its position. In *McMahon*, the Third Circuit held that the use of remedies under a state wage claim statute to redress delinquent employer contributions to ERISA plans "does not merely relate to [the] pension plans, it competes with the mechanism that Congress carefully established in ERISA itself." 794 F.2d at 106. The Court confronted its prior footnote to the contrary in *Ambrose*, and rejected it.

> When *Ambrose* was submitted to this court, the Supreme Court's decision in *Shaw* had not yet been announced and there is no reference to it in the *Ambrose* opinion. Moreover, subsequent to the issuance of the *Ambrose* opinion, the Supreme Court decided *Metropolitan Life Insurance*, 105 S.Ct. 2380 (1985). *Shaw* and *Metropolitan Life* make it very clear that state laws relating to a covered plan, even those that are arguably consistent with the goals of ERISA, are preempted by Section 514(a), 29 U.S.C. § 1144(a). We do not believe that this aspect of *Ambrose* can survive *Shaw* and *Metropolitan Life*.

794 F.2d at 108. The only federal case cited by Petitioners in support of their position has been overruled by the Court that issued it. It is astonishing that the Petition does not acknowledge this fact.

The other case relied upon by Petitioners, *Sasso*, was decided three years ago, without the guidance of this Court's recent rulings, and instead was based on *Ambrose*, since overruled, and on an analogy to *AT&T v. Merry*, 592 F.2d 118 (2d Cir. 1979), whose holding, permitting garnishment of accrued pension benefits under a state domestic relations order, has since been addressed by an amendment to ERISA. 26 U.S.C. § 401(a)(13)(B).

This Court is not faced with "an appellate conflict" on preemption of state law remedies by ERISA. It is not presented with any "special and important reasons," as required by Rule 17 of this Court, to review this case on writ of certiorari. It is faced only with an attempted resuscitation of outdated and overruled decisions that do not create any conflict between the Delaware Supreme Court's ruling in this case and the controlling law in this area, as set forth by this Court and as applied by every federal court which has ruled on this question.

.II. THE ISSUE PETITIONERS RAISE IS "IMPORTANT" ONLY TO THE EXTENT THAT CONGRESSIONAL INTENT TO MAINTAIN A UNIFORM NATIONAL MULTI-EMPLOYER PENSION SYSTEM BE SUSTAINED BY LEAVING UNDISTURBED THE CORRECT DELAWARE DECISIONS BELOW.

As discussed in Argument I, ERISA indubitably was designed to create a uniform national employee benefit system for employers like Wooleyhan, their employees and the unions, such as the Teamsters, for covered multi-employer plans. As noted above, ERISA is broadly preemptive of all state laws which relate to such employee benefit plans. 29 U.S.C. § 1144(a). In this case, without dispute, all parties and

plans are under ERISA. It is equally beyond dispute that ERISA makes no provision for imposition of individual liability on Respondents, who at one time were officers or managing agents of the Wooleyhan corporation.

In this uniform federal system, certainty and predictability of operation and enforcement from state to state was considered important by Congress, including the enforcement remedies available. *See* S.Rep.Nos. 93-127, 93-383, 93rd Cong., 2nd Sess., *reprinted in* 1974 U.S. Code, Cong. & Admin. News 4882-83, 4990-5001, Statement of Senator Williams at 5187-89. For this reason, Congress has designed ERISA with a preemptive force that is "unique" and "extraordinary." *Metropolitan Life Insurance Co. v. Taylor, supra,* 107 S.Ct. at 1547.

Petitioners assert that Delaware collection law in addition to ERISA enforcement procedures is available to them. This includes the Delaware WPCA which permits what ERISA itself does not— direct personal collection actions against officers and managing agents of corporations such as Respondents. 19 *Del.C.* §§ 1101-1115. Respondents contend that valid grounds for this assertion of Petitioners cannot be found in the ERISA statute, its legislative history or the decisions of this Court and the lower federal courts. Moreover, the result sought would lead to the very lack of uniformity which is clearly contrary to the federal statutory scheme. Thus the "importance" of the instant Petition is simply this Court's opportunity to reinforce Congressional intent, and affirm the Delaware courts' correct view of ERISA, by denying certiorari.

The Delaware courts below found no basis for subsuming state remedies under covered plans, relying on this Court's decisions in *Pilot Life Insurance Co. v. Dedeaux* and *Metropolitan Life Insurance Company v. Taylor, supra.* Particularly *Metropolitan Life* was considered controlling because it involved enforcement of a covered ERISA plan with state remedies. *Id.* 107 S.Ct. at 1546-1548.

Congress enacted a uniform national system which includes its own detailed enforcement provisions It did not explicitly in-corporate supplementary state enforcement remedies. *Cf. Combs v. Indyk*, 554 F.Supp. 573 (E.D.Pa. 1982). This was done deliberately because doing otherwise would lead to multiple enforcement systems in different states, frequently involving the same employers and unions, with the only difference geography. Congress not surprisingly chose not to do so. *McMahon v. McDowell, supra.*, 794 F.2d at 105-07; S.Rep.No. 93-127, 93rd Congress, 2nd Sess., *reprinted in* 1974 U.S. Code, Cong. & Admin. News 4871-72, 4882-83.[3] With limited exceptions spec-

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[3] A pertinent excerpt from the cited Senate Report reads:

> "The intent of the Committee is to provide the full range of legal and equitable remedies available in both state and federal courts and to remove jurisdictional and procedural obstacles which in the past appear to have hampered effective enforcement of fiduciary responsibilities under state law or recovery of benefits due to participants.
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> * * *
>
> Because of the interstate character of employee benefit plans, the Committee believes it essential to provide for a uniform source of law in the areas of vesting, funding, insurance and portability standards, for evaluating fiduciary

ified in ERISA itself, plan enforcement is a function of federal law only. *Id.* 5188.

On occasion in the past Congress has deliberately adopted state enforcement remedies as part of a federal scheme. *See e.g.*: Fair Labor Standards Act, 29 U.S.C. § 218 (1982); Age Discrimination in Employment Act, 29 U.S.C. § 633 (1982); Title VII of the Civil Rights Act of 1968, 42 U.S.C. § 2000h-4 (1982). However, in ERISA, including the 1980 Amendments, Congress clearly did not do this and an intent to the contrary cannot be implied from the several miscellaneous sections cited by Petitioners. As Judge Stapleton observed in *McMahon*: "Had Congress intended to impose the additional liability sought by plaintiff, it surely knew how to do so. However, it chose not to authorize this sort of personal liability." *McMahon v. McDowell, supra.*, 794 F.2d at 107.

Delaware state law dealing with collection remedies and personal liability of individuals connected with corporate employers is similar to that of Pennsylvania, but differs from comparable laws in other states, many of which provide wage and fringe benefit collection procedures which are more restrictive. 19 *Del.C.* § 1101(b); 43 *Pa.Stat.* § 260.1 et seq.; *cf. e.g.*, *NJSA* 34:11-57 *et seq.* (New Jersey); *An.Code Md.*, Art. 100, § 93 *et seq.* (Maryland).

Whether or not and under what specific circumstances the corporate veil may be penetrated and personal liability assigned to individual shareholders, officers, directors or employees of corporate employers is a significant factor in the initial contemplation,

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conduct, and for creating a single reporting and disclosure system in lieu of burdensome multiple reports."

undertaking and maintenance of employee benefit plans by corporate employers. The spectre of unclear personal liability could well chill employer generosity. Liability standards and enforcement should not vary from state to state and wisely was included in the uniform system enacted by Congress. Piercing the corporate veil to pursue other than corporate assets in the case of delinquent contributions to a multi-employer plan can be achieved only if permitted by ERISA itself. *See* 29 U.S.C. § 1301.[4] In the legislative history of ERISA some members of Congress evinced some interest in expanding the legislation to incorporate state remedies. However, this did not happen, lending strength to Respondents' view of the resulting statute. Sen. Debate, August 22, 1974, 1974 U.S. Code, Cong. & Admin. News 4770-71.[5]

Thus Petitioners' discussion of an "important" question in its Argument II of the Petition speculates beyond anything supportable by the facts of this case.

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[4] *See, also Solomon v. Klein*, 770 F.2d 352 (3d Cir. 1985) and *Connors v. P&M Coal Co.*, 801 F.2d 1373 (D.C. Cir. 1986) (holding that ERISA, as amended by MPPAA, does not permit imposition of personal liability on a shareholder or officer for a corporation's contributions to an ERISA plan, in absence of proof that corporation is to be disregarded as a matter of corporate law —an allegation not made or supported in this case).

[5] Included in the cited Senate debate were the following comments of Senator Harrison Williams:

> "State laws compelling disclosure from private welfare or pension plans, imposing fiduciary requirements on such plans, imposing criminal penalties on failure to contribute to plans—unless a criminal statute of general application—establishing state termination insurance programs, et cetera, will be superseded."

The instant case does not generally invoke "* * * preemption of State law affecting commercial transactions involving employee benefit plans * * *." Petition, p. 10. Petitioners' stated ambit is far too broad and their arguments which follow are dehors the facts at bar and academic at best. Their worries about a "vacuum of commercial law" (Petition, p. 11) find no support in the very limited facts in the Complaint below, the only facts of record herein (*supra*, p. 1, ftn. 1). Therefore, Petitioners' succeeding litany of preemption "horribles," including federal preemption of state corporate and security laws, state personal injury law and state liens, are not before this Court and constitute rank speculation. Petition, pp. 11-13. In actuality, if Congress hereafter chose to regulate and preempt any or all of those areas under the Commerce Clause, it arguably could; but presumably it would do so directly, as it did in ERISA, and the constitutionality thereof would thereafter be duly tested. The instant facts are not the proper setting to speculate on what might occur, but has not. Involved herein is the narrow question of whether Delaware WPCA collection remedies have somehow been engrafted into federal ERISA enforcement of covered plans, where the federal statute itself contains no such remedies, and makes no explicit incorporation. ERISA, its legislative history and the decisions of this Court clearly demonstrate the answer is no. The Supreme Court of Delaware correctly decided that Delaware wage claim remedies cannot be used to enforce rights arising out of employee benefit plans under ERISA.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectively submitted,

CONNOLLY, BOVE, LODGE AND HUTZ

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